

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.**

In the Matter of	)	
	)	
Rulemaking to Amend Parts 1, 2, 21 and 25	)	CC Docket No. 92-297
of the Commission's Rules to Redesignate	)	
the 27.5-29.5 GHz Frequency Band, to	)	
Reallocate the 29.5-30.0 GHz Frequency Band,	)	
to Establish Rules and Policies for Local	)	
Multipoint Distribution Service and for	)	
Fixed Satellite Services	)	

**REPLY COMMENTS OF THE COMPETITION POLICY INSTITUTE**

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## REPLY COMMENTS OF THE COMPETITION POLICY INSTITUTE

The Competition Policy Institute ("CPI") submits these comments in response to the Federal Communications Commission's ("Commission") *Sixth Notice of Proposed Rulemaking*<sup>1</sup> in the above-captioned proceeding. CPI is a non-profit organization that advocates state and federal regulatory policies to bring competition to energy and telecommunications markets in ways that benefit consumers.

### I. INTRODUCTION AND SUMMARY

When the Commission requested comments in the *Fourth Notice of Proposed Rulemaking*<sup>2</sup> in this proceeding in 1996, CPI urged the Commission to establish temporary eligibility restrictions for the LMDS A Block licenses. We argued that the Commission was justified to be concerned that ILECs and incumbent cable companies might acquire the spectrum simply to protect their existing monopoly services. We also agreed with the Commission's conclusion that LMDS had the potential to offer consumers new choices for both telephony and video services, helping bring to fruition the vision of competition in the 1996 Act. At that time, CPI believed that LMDS might provide significant facilities-based competition to both ILECs and incumbent cable television providers.

For these reasons, we supported temporary eligibility restrictions to encourage the development of a third competitor in each market for video and telephony and ensure that licensees would have the maximum incentives to develop LMDS technology to its full potential.

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<sup>1</sup> *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, CC Docket 92-297, *Sixth Notice of Proposed Rulemaking*, FCC 99-379 (rel. Dec. 13, 1999). ("Sixth Notice").

<sup>2</sup> *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, CC Docket 92-297, *First Report and Order and Fourth Notice of Proposed Rulemaking*, FCC 96-311 (rel. Jul. 22, 1996) ("Fourth Notice").

Over the last three years, the LMDS market has not developed as expected. According to the *Sixth Notice*, there are few providers offering LMDS-based services, and many licensees apparently do not intend to use LMDS to provide either residential local telephone service or video service. On the other hand, according to the Commission, many LMDS licensees now view the technology as particularly well-suited to provide small and medium-sized business customers with high-speed data and Internet services.<sup>3</sup>

Several related regulatory developments have also affected the marketplace for LMDS. Since the first awards of LMDS spectrum in May 1997, the Commission has made available other parts of the spectrum that offer the potential to deliver similar types of services to similar types of customers as LMDS might offer.<sup>4</sup> Further, the Commission amended its rules for Instructional Television Fixed Service ("ITFS") and Multichannel Multipoint Distribution Service ("MMDS") licensees, allowing them to provide two-way communications services.<sup>5</sup> The Commission also recently released a spectrum policy statement that provides a "guidepost for the reallocation of approximately 200 megahertz of spectrum mandated by Congress over the next three to five years."<sup>6</sup>

At the same time, the Commission's policies implementing the Telecommunications Act of 1996 have spurred the growth of a new segment of the competitive local exchange industry,

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<sup>3</sup> *Sixth Notice* at ¶ 32.

<sup>4</sup> See *Service Rules for the 746-764 and 776-794 MHz bands and Revisions to Part 27 of the Commission's Rules*, First Report and Order, WT Docket No. 99-168, FCC 00-5 rel. Jan 10, 2000; *Amendments to Parts 1, 2 and 101 of the Commission's Rules*, Notice of Proposed Rulemaking, WT Docket No. 99-327, FCC 99-333 (rel. Nov. 10, 1999) ("24 GHz Notice"); *Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands*, ET Docket No. 95-183, RM-8553, *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz*, PP Docket No. 93-253, (1997) *Report and Order and Second Notice for Proposed Rulemaking* at ¶ 32. ("39 GHz Order").

<sup>5</sup> See *Amendment of Parts 21 and 74 of the Commission's Rules to enable MDS and ITFS Licensees to Engage in Fixed Two-Way Transmissions*, 13 FCC Rcd 19112, ¶¶ 14-18 (1998).

<sup>6</sup> *Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium*, Policy Statement, FCC- 99-354, (rel. November 22, 1999) at ¶ 3 ("*Spectrum Policy Statement*").

the "data CLECs". These companies are competing for the high-speed data and Internet needs of small and medium-sized business customers with DSL services that use unbundled loops purchased from ILECs.

In the *Sixth Notice*, the Commission seeks comment on whether it should allow the LMDS eligibility restrictions to sunset according to the rule adopted in the *Second LMDS Order* and whether the Commission should apply the standard it adopted in that order for deciding to extend the eligibility restriction or whether it should adopt a new standard.

In these reply comments, CPI contends that the reasoning underlying the standard the Commission adopted in the *LMDS Second Report and Order* no longer applies. In its place, we suggest the Commission adopt the more flexible standard developed in the *39 GHz Order* to determine whether to allow the eligibility requirements to sunset. If the Commission applies the *39 GHz Order* standard, we think the Commission will conclude that the eligibility restrictions are no longer needed to protect competition in the local exchange or multi-channel video programming distribution ("MVPD") market.

Finally, CPI argues that the Commission need not extend the eligibility restrictions to foster greater competition in the broadband market. Emerging competition among DSL, cable modem, MMDS, ITFS, 24 GHz, 39 GHz, and data CLEC services offer reasonable assurances that an ILEC or cable company strategy to acquire and warehouse spectrum to prevent new entry into the broadband market will surely fail and is thus unlikely.

## **II. THE STANDARD FOR DETERMINING WHETHER THE LMDS ELIGIBILITY RESTRICTIONS SHOULD SUNSET**

CPI agrees that the Commission should first determine the appropriate standard by which it will evaluate the need for continued LMDS eligibility restrictions. In the *Sixth Notice*, the Commission asks parties whether the standard codified in its rules remains appropriate or

"whether a different standard is more appropriate".<sup>7</sup> As a possible alternative, the *Sixth Notice* asks whether the *39 GHz Order* standard is more appropriate. Lastly, the *Sixth Notice* seeks comment on "the sufficiency of case-by-case review of license transfers and assignments to safeguard against anti-competitive acquisition of LMDS licenses if the eligibility rule is allowed to sunset."<sup>8</sup>

A. Second LMDS Order Standard

In the *LMDS Second Report and Order*, the Commission adopted the current eligibility rule with a sunset date of June 30, 2000.<sup>9</sup> The rule specifies that the eligibility restriction will expire unless the Commission extends its applicability "based on a determination that incumbent LECs or incumbent cable companies continue to have substantial market power in the provision of local telephony or cable television services."<sup>10</sup> The Commission tentatively concludes in the *Sixth Notice* that, if it applies this standard, given the current state of competition in local telephony and cable television services, it must extend the eligibility restrictions.

We agree with the Commission that the application of the *Second LMDS Order* standard to the eligibility question yields this result. We also strongly agree with the Commission's observation in the *Sixth Notice* and MCI WorldCom's comments that the CLECs hold only a small share of the local exchange service market.<sup>11</sup> A recent report issued by the Association for Local Telecommunications Services shows that CLECs serve only about five percent of the local

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<sup>7</sup> *Sixth Notice* at ¶ 40.

<sup>8</sup> *Sixth Notice* at ¶ 41.

<sup>9</sup> *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, CC Docket 92-297, *Second Report and Order, Order on reconsideration, and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 12545, 12556, FCC 97-82 at ¶ 160 (rel. Mar. 13, 1997) ("*Second LMDS Order*").

<sup>10</sup> 47 C.F.R. § 101.1003(a)(1).

<sup>11</sup> MCI WorldCom comments at p. 4.

telephone market and account for only about seven percent of the revenues in that market.<sup>12</sup> By any measure, this adds up to market dominance and leads to the easy conclusion that the ILECs retain market power. We also agree with MCI WorldCom that the slow pace of Bell Operating Company compliance with Section of 271 of the 1996 Act is further evidence of the lack of widespread local telephone competition and the ILECs' corresponding market power.<sup>13</sup>

While MCI WorldCom is correct on the results of applying the *Second LMDS Order* standard, their comments do not address a central issue exposed by the Commission: the rationale for focusing on ILEC market power in local telephone markets has weakened because of changes in the LMDS market. Other parties note that the rationale underlying the original LMDS eligibility rule may no longer be appropriate for the Commission's use in determining whether to extend that rule.

As a threshold matter, CPI agrees with US West that the Commission has an affirmative duty to re-evaluate the reasoning underlying the eligibility restrictions imposed in the *LMDS Second Report and Order*.<sup>14</sup> The torrid pace of innovation in telecommunications technology and the marketplace necessitates that the Commission examine the basis for its prior decision, and establish a consistent framework which it can apply to future spectrum allocations that may raise similar concerns.

The Commission stated as much when it argued to the U.S. Court of Appeals for the D.C. Circuit, that the LMDS eligibility restriction would “presumably disappear” “[i]f experience demonstrates that non-LEC licensees do not use LMDS to provide telephone service.”<sup>15</sup> As the

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<sup>12</sup> An ALTS Analysis: *Consumer Benefits of the 1996 Telecommunications Act*, HAI Consulting, Inc. Feb. 2, 2000.

<sup>13</sup> MCI WorldCom comments at p. 4.

<sup>14</sup> US West comments at p. 10, citing *Bechtel v. FCC*, 10 F. 3d 875, 878 (D.C. Cir. 1993).

<sup>15</sup> Brief for Respondents Federal Communications Commission, at p. 30, *Melcher v. FCC*, 134 F. 3d 1143 (D.C. Cir. 1998) (No. 93-1110) (filed Sept. 5, 1997).

National Telephone Cooperative Association ("NTCA") comments: "LMDS is not being developed to provide basic telephone service."<sup>16</sup>

After considering the changes in technology and the marketplace since the Commission last ruled on this issue, CPI believes that the *Second LMDS* standard is no longer appropriate for determining whether the Commission should extend the LMDS eligibility restrictions.

B. 39 GHz Order Standard

In the *39 GHz Order* the Commission inquired "whether open eligibility poses a significant likelihood of substantial competitive harm in specific markets, and, if so, whether eligibility restrictions are an effective way to address that harm."<sup>17</sup> Instead of relying on the *LMDS Second Report and Order's* standard in the instant case, CPI suggests the Commission adopt the standard adopted in the *39 GHz Order*.

CPI believes the Commission was correct in both the *39 GHz Order* and the *24GHz Notice*, when it stated that its approach relies on "competitive market forces to guide license assignment absent a compelling showing that regulatory intervention to exclude potential participants is necessary."<sup>18</sup> This standard is most consistent with the Commission's statutory mandate that spectrum assignment "promot[e]...economic opportunity and competition."<sup>19</sup>

Under this analysis, the Commission must first assess the likelihood of "substantial anticompetitive effects" if eligibility is open to all entities.<sup>20</sup> In applying this standard, the Commission concluded it was unlikely ILEC eligibility would cause substantial anticompetitive effects. The Commission's finding was based on its analysis of the markets in which 39 GHz services were expected to compete. The Commission found that these markets for point-to-

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<sup>16</sup> NTCA comments at p. 5.

<sup>17</sup> *39 GHz Order* at ¶ 32.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* (citing 47 U.S.C. § 309(j)(3)).

<sup>20</sup> *Id.* at ¶ 33.



point backhaul and backbone transmission were competitive and that ILEC entry through 39 GHz services posed no risk to either market. The Commission further found that ILECs "should have little or no incentive to acquire those licenses with the anticompetitive intent of foreclosing entry by other firms and preserving market power."<sup>21</sup> The Commission relied on numerous factors to reach that conclusion, including:

- Presence of non-ILEC licensees in 39 GHz band
- Other spectrum that would be available soon, enabling licensees to compete with 39 GHz licensees.
- Potential entry by other wireless licensees
- Wireline facilities based competition
- Existence of LMDS Eligibility restriction<sup>22</sup>

The Commission conducted a similar analysis when it reached the tentative conclusion in the *24 GHz Notice* that open eligibility posed no risk of substantial competitive harm.

In both the *39 GHz Order* and the *24 GHz Notice*, the Commission cited the LMDS eligibility restriction as a factor in its decision not to impose a similar restriction in those auctions. While this was one of the factors in those decisions, we do not think the Commission need reopen the issue of eligibility restrictions in those auctions if it allows the LMDS eligibility restriction to sunset in this case.

Rather, we agree with PCIA that the Commission should establish consistent rules for all fixed wireless services, and make sure that spectrum is widely available.<sup>23</sup> As PCIA notes, this is consistent with the Commission's recent *Spectrum Policy Statement*, which states:

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> PCIA comments at p. 3.

Harmonization provides regulatory neutrality to help establish a level playing field across technologies and thereby foster more effective competition. Such a structure would permit reliance on the marketplace to achieve the highest valued use of the spectrum. It would also ensure that the Commission and its processes do not become a bottleneck in bringing new radio communications services and technologies to the public."<sup>24</sup>

Simply put, CPI agrees with the principles set forth in the *Spectrum Policy Statement* and recommends the Commission apply those principles in this proceeding.

C. Case-by-Case Review of License Transfers

The *Sixth Notice* further asks for comment "on the sufficiency of case-by-case review of license transfers and assignments to safeguard against anticompetitive acquisition of LMDS licenses if the eligibility rule is allowed to sunset."<sup>25</sup> The Commission previously stated that its authority to review license transfers for their consistency with the public interest provides "an effective tool to ensure that proposed license acquisitions by incumbent LECs will not, in particular cases, be inconsistent with the pro-competitive policies that guide our licensing of LMDS and that led to our establishment of the eligibility restrictions."<sup>26</sup>

CPI agrees with NCTA that "the transfer and assignment procedure is crucial to the efficient functioning of the marketplace."<sup>27</sup> We also agree with US West that the license transfer review process has the advantage of "assuring that the Commission's public interest

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<sup>24</sup> *Spectrum Policy Statement* at ¶ 9.

<sup>25</sup> *Sixth Notice* at ¶ 41.

<sup>26</sup> *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, 13 FCC Rcd 4856, 4906-7 (1998) ("*Third Order on Reconsideration*").

<sup>27</sup> NCTA comments at p. 9.

determinations account for unique facts and circumstances in each individual case."<sup>28</sup> Since the only opportunity now for ILECs or incumbent cable companies to acquire LMDS A Block licenses is from existing licensees, the Commission's approval process provides an effective backstop if the Commission believed such a transaction would retard competition.

### **III. APPLYING THE 39 GHZ ORDER STANDARD**

In the *Sixth Notice*, the Commission focuses its initial analysis on three specific markets: local telephony, cable television, and broadband. CPI believes that, if the Commission applies the *39 GHz Order* standard to these markets, it should conclude that there is little chance the sunset of the LMDS eligibility restrictions would have "substantial anticompetitive effects" on any of those markets.

#### **A. Local Telephone Service**

There are two questions the Commission must examine to decide whether eliminating the LMDS A Block eligibility restrictions will likely lead to substantial competitive harm in the local telephone market. The first is to what extent LMDS will ever compete in the local telephone market. Second, even if LMDS competes in the local telephone service market, are there other substitutable fixed wireless services that compete in the same market, minimizing any incentive ILECs might have to acquire LMDS spectrum for anticompetitive purposes.

As the *Sixth Notice* suggests, there are substantial doubts that LMDS will ever be a viable competitor in the local telephone market, particularly for residential services. For instance, the Commission observes "an industry segment aiming to provide service akin to typical landline service...has yet to emerge."<sup>29</sup> Elsewhere in the *Sixth Notice*, the Commission offers various reasons why LMDS might not emerge as a competitor to the LECs in the provision of local

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<sup>28</sup> US West comments at p. 18.

<sup>29</sup> *Sixth Notice* ¶ 32.

telephone service. The comments of other parties provide additional support for the Commission's observations.

For instance, the *Sixth Notice* suggests that line of sight issues and the cost of CPE may keep LMDS from being an effective competitor for delivering local telephone service to single family homes.<sup>30</sup> The Rural Telecommunications Group ("RTG") also shares this view: "it is questionable whether LMDS will ever develop as a tool for deploying either basic or broadband service to individual residential customers."<sup>31</sup>

In the *Sixth Notice* the Commission observes that LMDS is more likely to be used as a means to extend existing networks rather than as a stand-alone network.<sup>32</sup> One LMDS licensee, the Central Texas Telephone Cooperative, comments that it "is able to deploy LMDS in rural areas by using LMDS as a component in its network."<sup>33</sup>

The comments also show that the Commission was correct in its observation that "LMDS will most likely compete against the ILECs and against wireless providers operating at 24 GHz and 39 GHz for new high-speed data and Internet customers."<sup>34</sup> Rural telephone companies, for instance, argue they need the ability to deploy LMDS in their service areas in order to bring advanced services to their customers.<sup>35</sup> In addition, Hyperion, a CLEC affiliate of a cable company, argues that "LMDS suitability for data and associated telecommunications purposes is widely recognized."<sup>36</sup> Hyperion further contends that, in their business plan, LMDS is "highly complementary to our fiber-based systems as an economical means to provide last mile connectivity" to deliver economical broadband service.<sup>37</sup> In contrast, there is no evidence in the

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<sup>30</sup> *Id.* at ¶ 33.

<sup>31</sup> Rural Telecommunications Group ("RTG") comments, at p. 5.

<sup>32</sup> *Sixth Notice* at ¶ 33.

<sup>33</sup> Central Texas Telephone Cooperative ("CTTC") comments at p. 6.

<sup>34</sup> *Sixth Notice* at ¶ 39.

<sup>35</sup> See OPASTCO comments at p. 5.

<sup>36</sup> Hyperion comments at 3-4.

<sup>37</sup> *Id.* at p. 2.

comments that LMDS will likely compete directly with traditional landline telephone services provided by ILECs.

Moreover, when we apply the same analysis the Commission employed in the *39 GHz Order* and the *24 GHz Notice*, it is clear that other sources of competition may alleviate concerns about the impact of ILEC participation in the secondary market for LMDS licenses.

First, similar to the status of the 39 GHz band at the time of the *39 GHz Order*, there already are now many non-ILEC LMDS licensees due to the initial eligibility restriction. We doubt that these licensees would freely transfer these LMDS licenses to the ILECs with whom they compete, especially if there exists potential to use those licenses to attract customers away from the ILEC.

Next, other fixed wireless providers are now offering local exchange-type services in competition with ILECs. Providers in the 24 GHz and 39 GHz band are competing in major markets with ILECs, targeting small and medium-sized business customers. Moreover, other fixed wireless services, such as MMDS and ITFS, may soon offer consumers additional choices for local telephone and related services.

Third, facilities-based wireline entrants, spurred by the Commission's pro-competitive implementation of the 1996 Act, are deploying facilities and offering services to consumers in competition with ILECs. CPI knows that most consumers cannot choose an alternative local telephone service company today. There is, nevertheless, enough potential competition to suggest that "it is implausible that ILECs would pursue a strategy of buying LMDS licenses in the hope of foreclosing or delaying competition, and implausible that they would succeed if that strategy were attempted."<sup>38</sup>

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<sup>38</sup> See *39 GHz Order* at ¶ 33.

We recognize that there are distinctions between the LMDS A Block licenses and the other fixed wireless services we are discussing. Specifically, the size of the LMDS A Block makes it unique, especially when compared to the spectrum blocks available in the 24 GHz and 39 GHz bands. However, the size of the spectrum block apparently has little impact on the services a licensee can deliver. RTG, for instance, contends that "a licensee can offer such competitive services with considerably less spectrum, and licensees are currently doing so."<sup>39</sup> RTG further notes that bidders in the 39 GHz or 24 GHz auctions could acquire all the licenses within a bidding area to assemble a block of spectrum larger than the LMDS A block.<sup>40</sup> We agree with RTG that these factors minimize the distinction between the large LMDS A block and spectrum available in other bands.

In conclusion, we think it is at best unclear what role LMDS will play in the local exchange market. Even if LMDS emerges as a competitor in the local exchange market, the ILECs face sufficient competition from other sources to allow the eligibility rule to sunset without harming that market.

#### B. Cable Television

At the time the Commission adopted the *Second LMDS Order*, it anticipated that LMDS would provide further competition to the dominant cable television providers. As the Commission recognizes in the *Sixth Notice*, that competition has yet to emerge. The Notice, moreover, expresses the Commission's view that LMDS will likely not serve single family residences and instead may serve small and medium-sized business customers. If the Commission is correct, that means it is unlikely LMDS licensees will, in the near term, offer

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<sup>39</sup> RTG comments at p. 7.

<sup>40</sup> *Id.*

MVPD-type services, since small and medium sized businesses are not usually MVPD customers.

When the Commission established the eligibility restrictions in the *Second LMDS Order*, it cited the business plans of two companies that intended to offer video services on an LMDS platform.<sup>41</sup> In contrast, the *Sixth Notice* mentions the transformation of one of these companies, Cellularvision, into a high-speed Internet access provider and makes no mention of the other company. We cannot conclude from this evidence that LMDS will *never* provide competition for video services. But the record in this proceeding no longer provides a basis to conclude that licensees will use LMDS to provide MVPD services to compete with incumbent cable companies.

The passage of time also suggests that Direct Broadcast Satellite (DBS) is emerging as a more durable competitor to wireline video. A recent report suggests that two out of every three new MVPD subscribers is choosing a DBS service.<sup>42</sup> We expect DBS to remain a viable competitor to cable with enactment of the Satellite Home Viewer Act that eliminated a significant disadvantage DBS providers faced in competing with cable. We thus conclude it is unlikely that the sunset of the LMDS eligibility restriction will have a negative impact on competition in the MVPD market.

### C. Broadband

The *Sixth Notice* next suggests that the Commission might extend the eligibility restrictions to "avert the possibility of incumbent LECs and cable companies acquiring LMDS to forestall new facilities based competition for broadband services."<sup>43</sup> The *Sixth Notice* invites

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<sup>41</sup> See *Second LMDS Order* at ¶ 170.

<sup>42</sup> Address by Chairman William E. Kennard, Telecommunications @ the Millennium: The Telecom Act At Four, Hot Links To An Open Society, National Press Club, at p. 7 (February 8, 2000) (As Prepared for Delivery) ("Kennard Anniversary Speech") <http://www.fcc.gov/Speeches/Kennard/2000/spwek005.html>.

<sup>43</sup> *Sixth Notice* at ¶ 43.

parties to comment on a range of issues regarding the potential for LMDS to provide a "third means of broadband access into the home";<sup>44</sup> the extent to which other media might offer broadband access in competition with LMDS;<sup>45</sup> and whether the broadband offerings by ILECs and incumbent cable providers justify extension of the LMDS eligibility restriction.<sup>46</sup>

Commissioner Powell voices his concern that the Commission might be intent on renewing the eligibility restrictions "not based on new evidence that the predicted harm has been realized (as feared), but on a new set of speculative fears."<sup>47</sup> He further suggests that these "new-found fears [are] less sustainable than the original basis for the exclusion."<sup>48</sup> In support of his dissent, Commissioner Powell points out the Commission has, in other venues, admitted that the broadband market is nascent and that neither cable companies nor local telephone companies have market power in the broadband market.<sup>49</sup>

CPI agrees with Commissioner Powell that the extension of the LMDS eligibility restriction to foster broadband competition is less defensible than the original goal of protecting local telephone and video competition.<sup>50</sup> When we apply the *39 GHz Order* test to the specific broadband market we find little support for extending the LMDS eligibility restriction.

There are several factors at play in the broadband market that should assuage the Commission's concern about potential anticompetitive harm: 1) the fact that broadband competition is nascent; 2) the level of ILEC and cable investments in other technologies and 3) the panoply of other fixed wireless services that may compete to deliver broadband services.

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<sup>44</sup> *Id.* at ¶ 45.

<sup>45</sup> *Id.* at ¶ 46.

<sup>46</sup> *Id.* at ¶ 47.

<sup>47</sup> Powell dissent at p. 3.

<sup>48</sup> *Id.*

<sup>49</sup> See *Id.* citing *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc. to AT&T Corp.*, CS Docket No. 98-178, Memorandum and Order, 14 FCC Rcd. 3160, 3207 ¶¶ 92-96 (1999). Remarks by FCC Chairman William E. Kennard Before the Federal Communications Bar Northern California Chapter, San Francisco, CA, July 20, 1999 (As Prepared for Delivery).

<sup>50</sup> See *Id.*



First, the market for broadband services is barely developed today. As the Chairman remarked in his Telecommunications Act fourth anniversary speech, only 1.7 million Americans subscribe to broadband services from *any* provider.<sup>51</sup> In *Broadband Today*, the Cable Bureau suggested that it is too early to tell whether American consumers will pay for broadband service despite widespread belief in the communications industry that they will.<sup>52</sup> Moreover, as the *Sixth Notice* suggests, it is too early to know how consumers will use broadband services and which types of services will they demand. At such an early stage, it makes little sense to cordon off two significant sectors of the industry from a technology that may provide broadband access.

Second, both the ILECs and cable companies are spending vast amounts of money to upgrade their networks to roll out delivery of broadband services. For example, it is estimated AT&T will spend \$4 billion to upgrade its networks to provide two-way cable modem services.<sup>53</sup> SBC, meanwhile, in November announced "Project Pronto", a \$6 billion program to bring DSL service to 80% of its customers.<sup>54</sup> The notion that ILECs or cable companies would add to the strain on their capital resources to acquire LMDS spectrum and then let it sit idle is not credible.

Third, the Commission is working in other proceedings to free more spectrum for companies that may decide to offer broadband services using licensed radio spectrum. For instance, in the *24 GHz Notice* the Commission announced that it would auction 5 licenses per geographic area in the 24 GHz band.<sup>55</sup> Competitors in this band have suggested they will use this spectrum to provide broadband services to a variety of different types of consumers.<sup>56</sup> The Commission also recently adopted rules for the auction of spectrum formerly used for UHF

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<sup>51</sup> Kennard Anniversary Speech at p. 10.

<sup>52</sup> *Broadband Today*, Cable Services Bureau Staff Report to William E. Kennard, Chairman, October 1999, at 44-46.

<sup>53</sup> Scott Woolley, *Mike Strikes Back*, FORBES, Dec. 13, 1999 <http://www.forbes.com/forbes/99/1213/6414052a.htm>.

<sup>54</sup> [http://www.sbc.com/Technology/data\\_strategy/project\\_pronto/Home.html](http://www.sbc.com/Technology/data_strategy/project_pronto/Home.html).

<sup>55</sup> *24 GHz Notice* at ¶ 22.

<sup>56</sup> *Id.* at ¶ 21.

channels 60-69.<sup>57</sup> Qualcomm indicates it would use this spectrum for wireless broadband services.<sup>58</sup> This spectrum is particularly valuable because, unlike LMDS and some other fixed wireless services, these frequencies can penetrate walls, making it ideal for widespread deployment of broadband service, including single family homes. Meanwhile, MCI WorldCom and Sprint have each acquired rights to MMDS spectrum, and indicated their intent to roll out services in those frequencies that would compete for residential and business broadband consumers.<sup>59</sup>

The Commission also recognizes that other technologies will compete to deliver broadband services. In *Broadband Today*, for instance, the Cable Bureau notes that satellite systems may deliver broadband access in the next few years.<sup>60</sup> Companies such as RCN and WideOpenWest, meanwhile, are building new fiber optic based networks more suited to the delivery of broadband than either the cable or ILEC infrastructure.<sup>61</sup>

CPI concedes that the two most prevalent broadband services, DSL and cable modems, use facilities owned by companies that dominate their related markets. Some have seized on this characteristic to contend that the Commission should intervene in the broadband market or risk the development of a duopoly. In the past, the Commission has enacted policies based on the principle that two competitors in a market is not sufficient competition. In fact, CPI cited several of these instances in our comments to the *Fourth Notice* in this proceeding.<sup>62</sup>

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<sup>57</sup> See *Service Rules for the 746-764 and 776-794 MHz bands and Revisions to Part 27 of the Commission's Rules*, WT Docket No. 99-168, *First Report and Order*, FCC 00-5 rel. Jan 10, 2000.

<sup>58</sup> See QUALCOMM Incorporated Petition for Declaratory Ruling Giving Effect the Mandate of the District of Columbia Circuit Court of Appeals (filed January 28, 2000).

<sup>59</sup> See Applications of Sprint and MCI WorldCom for Consent to Transfer Control of Corporations Holding Commission License and Authorizations, CC Docket 99-333, (filed Nov. 17, 1999) at p. 85.

<sup>60</sup> *Broadband Today*, at p. 21-22.

<sup>61</sup> See Pete Lewis, *A Wire for all Reasons*, Denver Post Online, <http://www.denverpost.com/business/biz0206a.htm>.

<sup>62</sup> CPI comments, CC Docket 92-297, (filed August 12, 1996) at p. 5-6.

We do not think that similar policies to foster competition in the broadband market are needed at this time. Despite the obvious advantages cable companies and ILECs currently possess in their respective markets, neither of these two pipes is ideal for delivering broadband service. As the Cable Bureau stated in *Broadband Today*, each pipe has its shortcomings.<sup>63</sup> For example, existing cable networks serve predominantly residential consumers, leaving cable companies without their own facilities to bring broadband services to business customers. The cable network is also shared, meaning that transmission speed is somewhat dependent on the number of users online at a given moment.<sup>64</sup> Likewise, ILECs face difficulties in delivering DSL service to customers located more than a certain distance from the central office.<sup>65</sup> That distance is gradually being reduced as engineers develop new variations of DSL and develop ways to extend DSL transmissions over longer loops. For the moment, however, the fact that neither ILECs nor cable companies possess facilities ideal for broadband delivery makes it less likely their presence in the broadband market could create substantial competitive harm.

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<sup>63</sup> *Broadband Today*, at 19 (Cable); at 20 (DSL).

<sup>64</sup> *Id.* at 19.

<sup>65</sup> *Id.* at 20.

#### IV. CONCLUSION

CPI believes that, although both ILECs and incumbent cable operators maintain dominant positions in their markets, there is no longer the need to restrict them from investing in LMDS A Block licenses. The considerations upon which the Commission relied to establish those eligibility restrictions have either changed or dissipated. The Commission should adopt a standard to evaluate the need for continuing the eligibility restrictions that is consistent with the standard it used in deciding not to impose eligibility restrictions on other spectrum auctions. When we apply that standard we see no reason to extend the LMDS A Block eligibility restrictions to foster competition in the local telephone, MVPD or broadband market. For these reasons CPI urges the Commission to allow the LMDS A Block eligibility restrictions to sunset, according to 47 C.F.R. § 101.1003(a)(1), on June 30, 2000.

Respectfully Submitted,

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February 11, 2000

**Certificate of Service**

I, \_\_\_\_\_, hereby certify that on this \_\_\_\_\_ day of February, 2000 copies of the foregoing Reply Comments of the Competition Policy Institute were served by electronic filing or by first-class, United States mail, postage prepaid, upon each of the parties listed below.

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